BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. LOS ANGELES UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2012100140 ORDER DENYING MOTION TO COMPEL PRODUCTION

On October 17, 2012, Student filed a Request for Order Compelling Production of Student Records. In the request, Student claimed that an "incident report" exists regarding abuse perpetrated upon Student on September 7 and 12, 2012 by his special education teachers. The Request further claimed that this document is related to Student and maintained by Los Angeles Unified School District (District) and, as such, constitutes an education record that must be produced pursuant to federal and state law.

On October 30, 2012, District opposed the Request, arguing that (1) the report is not an education record and thus is not subject to pre-hearing production; (2) except for education records, pre-hearing discovery is not contemplated under the Individuals with Disabilities Education Act (IDEA); and (3) the report is, in any event, privileged under the attorney-client and work product privileges.

As discussed below, the report is not an education record and, thus, is not subject to per-hearing production. Other than education records, pre-hearing discovery is not contemplated under IDEA. Therefore Student's request to compel pre-hearing production of the incident report is denied on that basis.[1]

APPLICABLE LAW

IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child's "identification, evaluation and educational placement." (20 U.S.C. §1415(b)(1).) Each participating agency must permit parents to inspect and review

[1] This Order addresses only pre-hearing production, which is limited to education records. It does not address parties' rights to subpoena relevant other types of documents for the hearing itself. Because the narrow issue presented here does not require it, this Order does not address District's attorney-client and work product arguments.

any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an individualized educational program (IEP), or any hearing, or resolution session, and in no case more than 45 days after the request has been made. (See 34 C.F.R. §300.613(a) (2006).[2]) The right to inspect and review education records under this section includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. (See 34 C.F.R. §300.613(b).) All parents have the right to receive copies of all school records within five business days after parents make a request. (Ed. Code, §56504.)

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA). (20 U.S.C. § 1232; 34 C.F.R. § 99.3.) Education records include "records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed.Code, § 49061, subd. (b).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those "recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) Pupil or education records do not include "records of instructional, supervisory, and administrative personnel…which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo),* after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of "education records." Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to "maintain a record, kept with the education records of each student" (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that "list[s] those who have requested access to a student's education records and their reasons for doing so." (*Falvo, supra*, 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, "Congress contemplated that education records would be kept in one place with a single record of access." (*Id.*) The Court further concluded that "[b]y describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar…" (*Id.* at pp. 434-435.) The Court then found that individual assignments handled by many student graders in their separate classrooms were not student records. (*Id.*)

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2 All citations to the Code of Federal Regulations are to the 2006 edition.

In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 (*BRV)*, when determining whether or not an investigative report, which identified students in connection with alleged misconduct by a school district superintendent, was an education record, the Court of Appeal conducted an analysis of the "scant" judicial authority interpreting what constituted an education record. (*Id.* at pp. 751-755.) The Court of Appeal, citing *Falvo*, agreed with the Supreme Court, and stated that "the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like." (*Id.* at pp. 751-754.) The Court of Appeal then found that the investigative report, "which was not directly related to the private educational interests of the student," was not an education record, "as the report was not something regularly done in the normal course of business," and "was not the type of report regularly maintained in a central location along with education records…in separate files for each student." (*Id.* at p. 755.)

In *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, aff'd. *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653, the district court found that school district emails concerning or personally identifying a student that had not been placed in his permanent file were not education records as defined under FERPA. The court, citing *Falvo*, stated that Congress contemplated that education records be kept in one place with a single record of access to those records. Because the emails student requested had not been placed in his permanent file, and were therefore not "maintained" by the school district, the emails were not education records and the school district was therefore not required to produce them under a request for student records under the IDEA.

A party to a due process hearing under the IDEA has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2), (3).) The hearing officer in a special education due process hearing may issue subpoenas or subpoenas duces tecum (SDTs) upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit.5, § 3082, subd. (c)(2).) Special education law does not authorize the issuance of subpoenas for discovery purposes, only to compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2), (3).)

DISCUSSION

District's Opposition contains a declaration clarifying that incident reports relate to documentation of accidents, death, injury, medical events or theft on school sites. The incident report is an electronic document that the Principal or school site administrator fills out online. It is not kept at the school site or in a student's file, but is rather stored in a secure database.

Under the authorities cited above, such a document is not an education record and is not subject to pre-hearing disclosure. Other than education records, pre-hearing discovery is not contemplated under IDEA. For this reason, Student's Request is denied.

ORDER

Student's Request to Compel Production is denied.

Dated: November 02, 2012

/s/

JUNE R. LEHRMAN
Administrative Law Judge
Office of Administrative Hearings